

77-816

Supreme Court, U. S.

FILED

DEC 5 1977

MICHAEL RODAK, JR., CLERK

**IN THE SUPREME COURT OF THE
UNITED STATES
DECEMBER TERM, 1977**

MICHAEL DRIELICK,
Petitioner,

v.

No. A-333

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN**

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Now comes Michael Drielick, by John A. Picard, his attorney, and respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of the State of Michigan.

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court was filed on July 18, 1977, and is reported at 400 Mich 559; NW2d (1977). That opinion upheld a decision of the Michigan Court of Appeals which was filed on November 26, 1974, which is reported at 56 Mich App 664; 224 NW2d 712 (1974). Copies of both opinions are included in the appendix to this petition, *infra*, at pp A. 1-A. 13.

ORDER GRANTING EXTENSION OF TIME TO FILE PETITION FOR CERTIORARI

On October 12, 1977, an order was entered extending the time for the filing of the Petition for Certiorari to the Michigan Supreme Court to December 15, 1977.

JURISDICTION

The decision of the Michigan Supreme Court was filed on July 18, 1977. The jurisdiction of the United States Supreme Court is invoked under authority of 28 U.S.C. 1257 (3).

The Michigan Supreme Court, as a general rule, has followed the United States Supreme Court's decisions with respect to questions relating to illegal searches and seizures. The Michigan Supreme Court did so in the case at bench under authority of *United States v White*, 401 US 745; 91 S Ct 1122; 28 L Ed 2d 453 (1971). The Michigan Supreme Court rejected petitioner's illegal search and seizure claims under the *White* decision, *supra*, because it was "... of the opinion that were there to be further appeal on Fourth Amendment grounds, the view of the law which in all probability would be applied by the United States Supreme Court would be that expressed in Mr. Justice White's opinion" in the *White* case. (400 Mich at p 569, appendix, *infra*, at p A. 9)

In the Michigan Circuit Court murder trial of the petitioner, over the objection of his defense lawyer, the trial judge admitted into evidence a tape recorded telephone conversation between the petitioner and his girlfriend, the wife of the murder victim. In said conversation the petitioner admitted killing the deceased. Defense counsel's objection was that the tape recorded conversation was an il-

legal search and seizure, one conducted without a warrant where Detective Brown had ample time to obtain one, one conducted in violation of the petitioner's right to privacy and without his consent, and one conducted when the petitioner was not legally capable of making evidentiary admissions. (R. 371-373) Petitioner was ultimately convicted of first degree murder under Michigan law (MSA 28.548; MCLA 750.316), and was sentenced to prison for life.

The Fourth Amendment right against illegal searches and seizures was thereby preserved.

QUESTION PRESENTED

ISSUE I.

Whether the warrantless interception and recordation of petitioner's conversation without his knowledge or consent was constitutionally impermissible, and whether the admission into evidence of said recorded conversation at petitioner's murder trial renders his conviction invalid?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision which this petition involves is:

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF FACTS

Michael Drielick, the petitioner herein, was convicted of the first degree murder of Daniel McNeil contrary to Michigan law and was sentenced to prison for life. (MSA 28.548; MCLA 750.316)

On November 30, 1972 petitioner was arrested for the murder of Daniel McNeil.

On the morning of November 13, 1972, the body of Daniel McNeil was found in the rear seat of his car which was parked in front of his parents' home. (R. 107) The coroner listed the cause of death as a gunshot wound to the head at close range, presumably from a .16 gauge shotgun. (R. 157) The pathologist related that he had removed from the decedent's head a lead fragment, shotgun wadding, and plastic material. (R. 157, 158) A State Police expert testified that these materials were "characteristic" of a .16 gauge Winchester shotgun shell. (R. 142-148)

Subsequent to the death of the decedent (Daniel McNeil), it was learned that his wife (with whom he was no longer living), Nancy McNeil, was in possession of a .16 gauge shotgun. (R. 264, 265) At the murder scene the only other real evidence found was the stock of a rifle or a shotgun.

Florence McNeil, the deceased's sister, lived next door to her parents' home. She related that she was reading in her living room with the curtains closed and not paying close attention when about 11:30 p.m. on November 12, 1972 Daniel McNeil parked his automobile in front of his parents' house and remained in it. About 1:30 to 2:00 a.m. another automobile with a loud muffler passed by slowly, returned shortly later, and stopped behind Daniel McNeil's automobile. Someone approached Daniel McNeil's automobile and then departed. At that time a loud noise was heard, like an automobile backfiring. The type and color

of this automobile and the identity of the person(s) in it were never identified at all. (R. 176-188) All that Florence McNeil could testify clearly to was that the automobile had a loud muffler. It was established at trial that at the time of Daniel McNeil's death that his wife, Nancy McNeil, was in possession of a 1963 white Oldsmobile, which presumably had a loud muffler. (R. 469) Outside of a taped conversation, the primary evidence against the petitioner, the only other evidence introduced by the prosecutor was that on the day before Daniel McNeil died the petitioner, in front of Nancy McNeil and Daniel McNeil's mother, made a threatening statement about the deceased. (R. 197, 200-201) It was also shown at trial that recently Nancy McNeil had publically stated that if Daniel McNeil did not cease threatening her and her daughter, that she would murder him. (R. 450-452)

The prosecutor contended that the petitioner, who was at Nancy McNeil's apartment on the evening of November 12, 1972, took Nancy McNeil's 1963 Oldsmobile, drove over to where Daniel McNeil had parked his automobile, passed by, returned for the shotgun, and then went back and murdered Daniel McNeil (R. 535-537), after having taken four (4) Equinol tranquilizers and drinking eleven (11) cans of beer earlier that evening. (R. 495-496)

During the two weeks succeeding Daniel McNeil's death, the detective, William Brown, talked to Nancy McNeil several times (R. 407) and requested several times that she take a polygraph test. (R. 407) Detective Brown testified that during this time period Nancy McNeil was a suspect (R. 21-22), and that by November 30, 1972, the day on which the petitioner was arrested, the police were in the accusatory stages with her. (R. 22-23)

By November 28, 1972 the police still lacked sufficient evidence on which to make an arrest or take someone into custody. On the evening of November 28th, Nancy McNeil

went to the Buena Vista Police Station, to relate to Detective Brown information about the death of Daniel McNeil. She told him that on November 20, 1972, the petitioner told her that he had murdered Daniel McNeil. (R. 277-282) Detective Brown asked her to telephone the petitioner from the police station and get him to talk about what happened the eve on which Daniel McNeil died. (R. 287) In response to Detective Brown's request, she agreed to let him listen to the conversation and record it. (R. 282-287) This wire-tapping was done without a search warrant. During the recorded conversation, after stating that he had consumed a large quantity of pills in the past several days (R. 294), the petitioner made admissions about his involvement in the death of Daniel McNeil. (R. 297-298)

Two days later Detective Brown brought Nancy McNeil to the Buena Vista Police Station for additional questioning. According to Detective Brown's testimony, that morning from the police station Nancy McNeil telephoned the petitioner at work, telling him that "She had been picked up by the police and questioned and that the police knew who was involved in the incident, and that [they] had talked to her the night before. [The police] had talked to her all that day, that she wanted him to come in, they might as well just give up, because the police already knew and they had fingerprints from the forearm stock of a shotgun and everything else". (R. 17-20) According to the petitioner's testimony, Nancy McNeil told him that "she had been arrested, she had spent the night in jail, . . . they [the police] were going to get a warrant for myself, and that they had a piece of a gun with her fingerprints on it and my fingerprints on it, and they were going to take her to the Detroit Reformatory for Women. . . . She said she had a lawyer and he was there with her. . . . She said if I thought anything of her and Tammy [Nancy McNeil's daughter] I'd go down to the Buena Vista Police Station and take care of this thing." (R. 39-40)

The petitioner went to the Buena Vista Police Station that afternoon and talked to Detective Brown, out of concern for Nancy McNeil. At this time the petitioner believed that the above things told to him by Nancy McNeil were true. At the station he was told by Detective Brown that Nancy McNeil was at the jail and was being taken to the Detroit Reformatory for Women, in fact, that she was already on her way to Detroit. (R. 40-41)

After these occurrences the petitioner made a statement which led to his arrest. (Preliminary Exam. Trans. 41-42)

It was later established that all that happened was that Detective Brown had taken Nancy McNeil to the police station for questioning, had been fingerprinted at the county jail later on that day (but never detained there) and had made the above described telephone call to the petitioner. At this time the police did not know whose fingerprints were on the gunstock found by the victim's automobile. (Preliminary Exam. Trans. 23, 24, 26)

At trial Nancy McNeil and Detective Brown testified to the occurrence of the taped conversation on November 28, 1972, after which the tape was introduced into evidence and played for the jury. (R. 282, 285-300, 386-371) The jury also requested and were granted a rehearing of the tape during their deliberations. Petitioner's defense counsel objected to the admission of the tape into evidence, on the grounds that the procurement of the taped conversation was an illegal search and seizure, one conducted without a search warrant where Detective Brown had ample time in which to obtain one, one conducted in violation of the petitioner's right of privacy and without his consent, and one conducted when the petitioner was legally incapable of making evidentiary admissions. (R. 371-373)

The petitioner moved for a new trial on June 5, 1973, the motion being denied by the trial court.

The petitioner subsequently appealed to the Michigan Court of Appeals and the Supreme Court of Michigan, contending that: The warrantless interception and recording of his conversation was constitutionally impermissible. Both State Appellate Courts rejected petitioner's various Fourth Amendment claims. *People v Drielick*, 56 Mich App 664 (1974); *People v Drielick*, 400 Mich 559 (1977) (appendix, *infra*, pp A. 1-A. 13).

REASONS FOR GRANTING THE WRIT

I.

Petitioner's case presents to this Honorable Court the opportunity to resolve with finality the question of whether or not the warrantless interception and recording of a telephone conversation between petitioner and his girlfriend, Nancy McNeil, was constitutional in Fourth Amendment terms.

The recording at issue was used to convict the petitioner under Michigan law of the crime of first degree murder. A Michigan law enforcement officer induced petitioner's girlfriend to call the petitioner at his home from the police station and allegedly obtained her consent to monitor and record the conversation. The petitioner was without knowledge of the officer's conduct at the time it was taking place.

Petitioner contends here as he did in the Michigan Courts below, that under *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), the November 28, 1972 warrantless interception and recordation of his conversation without his knowledge or consent was constitutionally impermissible and that the admission into evidence of this conversation invalidated his first degree murder conviction.

Both the Michigan Court of Appeals and Michigan Supreme Court upheld the admissibility of the tape recorded

conversation at issue in this cause under authority of *United States v White*, 401 US 745; 91 S Ct 1122; 28 L Ed 2d 453 (1971) (see pp A. 1-A. 13, *infra*.) Petitioner however, maintains that both Courts below wrongly decided his claims. Of major significance is the fact that the *White* decision applied pre-*Katz* law. The surveillance in *White* occurred before the *Katz* decision, and that decision had previously been held to be nonretroactive in *Desist v United States*, 394 US 244; 89 S Ct 1030; 22 L Ed 2d 248 (1969).

There are undoubtedly factual distinctions to be made in the case at bench with *Katz*, i.e., the *Katz* case did not involve participant monitoring and the manner of interception was not the same. *Katz* represents a situation where the government placed an electronic listening and recording device outside a public telephone booth from which the defendant was making a call and obtained evidence to convict him for illegally transmitting wagering information.

The core issue in your petitioner's case is whether or not the fact that there was participant monitoring here can eliminate the search warrant requirement of the *Katz* case. Petitioner maintains that it cannot.

The records below are clear that petitioner did not consent nor did he intend to consent to have his conversations with Mrs. McNeil overheard by Detective Brown or recorded by him. In *Katz* it was made clear that "• • • the very nature of electronic surveillance precludes its use pursuant to the suspect's consent." (389 US, p 358; 88 S Ct, p 515)

Petitioner further maintains that Nancy McNeil could not constitutionally waive his rights under the Fourth Amendment. The Michigan Court of Appeals holding in this cause that Mrs. McNeil's consent obviated the necessity to obtain a search warrant (see p A. 11, *infra*), completely ignores this Court's several holdings rejecting the consent argument in the context of warrantless searches and sei-

zures. See e.g., *Chapman v United States*, 365 US 610; 81 S Ct 776; 5 L Ed 2d 828 (1961); *United States v Jeffers*, 342 US 48; 72 S Ct 93; 96 L Ed 59 (1951); *Stoner v California*, 376 US 483; 84 S Ct 889; 11 L Ed 2d 856 (1964).

Your petitioner would additionally assert that the question of whether or not Nancy McNeil gave her consent to listen to, and to record the conversation was not properly litigated in the Courts below. Petitioner submits that the trial court and the Michigan Court of Appeals below (A. 11) ignored the realities of the situation which demonstrated that Nancy McNeil merely purported to consent to the interception and the recording.

Petitioner maintains that the alleged consent of Nancy McNeil was not shown to have been voluntary. First of all, at the time of the listening and recording by Detective Brown on November 28, 1972, Nancy McNeil was herself a suspect and she was thus anxious to exculpate herself. Knowing that she was a suspect she informed Detective Brown that petitioner had admitted involvement in Daniel McNeil's death. Without ever having advised her of her right to refuse to consent to the monitoring and recording, Detective Brown induced her to call petitioner at his home from the police station and requested her to get petitioner to admit that he had killed Daniel McNeil. (R. 277-279, 287) As early as the preliminary examination and later at a hearing on the admissibility of the admission made by petitioner, Detective Brown testified that prior to the November 28, 1972 recording, he "implied" to Mrs. McNeil that "(He) thought she had committed the crime [i.e., killed Daniel McNeil], and had asked her several times to take a polygraph test, and when she indicated that she would rather get a lawyer, advised her that (He would) be keeping his eye on her and if she was going to get an attorney, to get a good one." (R. 407, Preliminary Exam. Trans. 20, 21) Detective Brown also testified that on No-

vember 30, 1972 he was in the "accusatory stage of the proceedings with her" and had administered Miranda warnings. (Preliminary Exam. Trans. 22, 23)

While this issue was not specifically raised in the trial court, your petitioner submits that there were enough facts presented to put the trial court on notice of the coerced consent issue. The Michigan Court of Appeals statement that the "record establishes that the consent was voluntary" (A. 11) was not a proper resolution of the issue despite the fact that there was no specific objection made at trial. Contrary to the decision of the Michigan Court of Appeals, the record facts presented to it clearly demonstrated involuntary consent, and not voluntary consent on the part of Nancy McNeil.

The case at bench very much parallels those situations found in *Weiss v United States*, 308 US 321, 330; 60 S Ct 269; 84 L Ed 298 (1939); *United States v Laughlin*, 223 F Supp 623 (1963), and *United States v Napier*, 451 F2d 552 (1971), where the party's consent was seriously questionable because of incapacity or government pressure. In the case at bench, your petitioner maintains that the factual situation is kindred to that found in *United States v Laughlin*, 222 F Supp 264 (1963). In that case the consent to tape was found involuntary in light of the "consentor's" testimony that "I felt I had to cooperate," 222 F Supp at p 266, under the implied threat of indictment if she did not. *Id.*, at p 268. Your petitioner submits that notwithstanding the failure to raise the issue at the trial court level, there were sufficient facts before the trial court that it should have been on notice of the voluntariness of consent issue and should have accordingly *sua sponte determined* (or conducted a hearing to determine) that the police, through Detective Brown initiated pressure on Mrs. McNeil for the purpose of overbearing her will, and should have thus held that her consent was involuntary, and accordingly should

have excluded the tape recorded evidence from the trial. The Michigan Court of Appeals determination (A. 11) is not supported by the record, and the fact that petitioner did not pursue this claim directly in his appeal to the Michigan Supreme Court should not preclude review by this Honorable Court in light of the way that the Michigan Supreme Court completely disregarded and did not respond to petitioner's claims that Mrs. McNeil could not consent or waive petitioner's rights against unreasonable searches and seizures in relation to the tape recorded conversation now at issue.

It has been about 10 years since this Honorable Court rendered its decision in the *Katz* case in 1967. Notwithstanding the various and sundry fictions in the realm of electronic surveillance, your petitioner maintains that participant monitoring as occurred in this case is within the rule of *Katz*. As far as expectations of privacy are concerned, whether it is looked at as the subjective state of mind of the petitioner or as a judgment of society, the petitioner's situation cannot be seriously distinguished from defendant *Katz*. Petitioner Drieliick was most assuredly just as ignorant of police monitoring and recording as was the defendant in the *Katz* case. Further, petitioner's expectation of privacy could not be said to be less than that of the defendant in *Katz*. The Court in the *Katz* case declined to permit the choice of suspects to be electronically monitored to the unreviewed action of agents for the government.

Petitioner submits that state police officials cannot avoid the holding of the *Katz* case by turning over the responsibility for the surveillance to a private citizen such as Nancy McNeil in the case now before the Court.

The State of Michigan, since the decision in *Katz*, had the burden to obtain a warrant prior to electronically monitoring and recording petitioner's conversation with Nancy

McNeil, or to set forth facts that would bring the search and seizure at issue within one of the specifically delineated exceptions to the warrant requirement. See *United States v United States District Court*, 407 US 297 at 318; 92 S Ct 2125; 32 L Ed 2d 752 (1972). In the case at bench neither burden was met by the State of Michigan. Thus, it is respectfully submitted that the electronic monitoring and recording was constitutionally impermissible.

Your petitioner finds little solace or comfort in the Michigan Court of Appeals and Michigan Supreme Court decisions in his cause for they completely ignore or fail to apply the correct legal standards of the *Katz* case. Thus, it is submitted that review of petitioner's cause is warranted because of the failure and refusal of the Michigan Appellate Courts below to apply the *Katz* standards to his cause.

The Michigan Supreme Court in its opinion in this cause correctly points out that at the time of its issuance, 10 of the 11 United States Courts of Appeals have followed Mr. Justice White's lead opinion in *United States v White, supra*, in holding that the Fourth Amendment does not require a warrant for electronic participant monitoring. (see opinion, *infra*, at A. 7) The Michigan Supreme Court further correctly points out that on at least 14 occasions this Honorable Court has denied petitions for certiorari to review decisions of the United States Courts of Appeal holding that the Fourth Amendment does not preclude warrantless, electronic participant monitoring. (see opinion, *infra*, at A. 8) Notwithstanding these observations by the Michigan Supreme Court, the petitioner submits that the issue has been presented to this Court with such increasing frequency to demonstrate that it is of such major significance that the time has now come for a definitive major decision. This is especially so because many state appellate courts, including Michigan, have held that they are not bound by plurality opinions of the United States Supreme

Court. See e.g., *People v Plamondon*, 64 Mich App 413, 423 (1975), where the Michigan Court of Appeals determined that it was not bound to follow the plurality opinion in the *White* case, and instead followed the reasoning and views in the *White* case as expressed in the dissenting opinion of Justice Harlan. While the *Plamondon* case was reversed by the Michigan Supreme Court as part of its decision in your petitioner's case before the Michigan Supreme Court, your petitioner herein submits that the Court of Appeals in the *Plamondon* case, points up the need for review of this most significant issue presented in this Petition for a Writ of Certiorari.

CONCLUSION

Wherefore, petitioner respectfully prays that this Honorable Court will grant this Petition for a Writ of Certiorari to review the judgment of the Michigan Supreme Court.

Respectfully submitted,

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OPINION OF THE SUPREME COURT

(Docket Nos. 56735, 57617)

Argued February 1, 1977 (Calendar Nos. 2, 3) —
Decided July 18, 1977

400 Mich 559, --- NW2d --- (1977)

LEVIN, J. The issue is whether warrantless electronic eavesdropping of a telephone conversation, with the consent of one of the participants in the conversation, violates the Fourth Amendment prohibition against unreasonable searches and seizures.

In these cases, consolidated on appeal, a witness for the people telephoned the defendant at the suggestion of police officers and obtained damaging admissions which were electronically recorded. No warrant was obtained from a magistrate before installation of the electronic surveillance equipment. The recordings were played at the trial over defendant's objection.

A panel of the Court of Appeals affirmed Michael Drielick's conviction of first-degree murder¹ on the ground that a warrant is not required for participant monitoring. A separate panel reversed Lawrence Plamondon's and Craig Blazier's convictions of extortion by threat of accusation² on the ground that a warrant is required. We affirm in *Drielick*, and reverse in *Plamondon* and *Blazier*.

¹ MCLA 750.316; MSA 28.548.

² MCLA 750.213; MSA 28.410.

A. 2

I

In *People v Beavers*, 393 Mich 554; 227 NW2d 511 (1975),³ this Court held that, unless authorized by a search warrant, a participant may not, consistent with the Michigan constitutional prohibition against unreasonable searches and seizures,⁴ electronically monitor a conversation which is transmitted to law enforcement officers.

Beavers was given prospective effect only.⁵ The participant monitoring in these cases preceded *Beavers*. The question whether the Michigan prohibition applies in the instant cases, which were pending on appeal with the issue preserved,⁶ was decided by *Beavers*. The Court is not disposed to reconsider that recent decision.

³ Two police officers monitored, without authorization of a warrant, a conversation between the defendant and a police informant carrying a battery-operated radio transmitter under his shirt while the informant bought heroin from the defendant in defendant's home. The conversations were not recorded. The eavesdropping officers were permitted over objection to testify regarding the overheard conversations at the trial.

⁴ Const 1963, Art 1, § 11.

⁵ "The decision today is to be applied prospectively." *People v Beavers*, *supra*, p 568. *Beavers* was decided April 7, 1975.

⁶ See *Desist v United States*, 394 US 244; 89 S Ct 1030; 22 L Ed 2d 248 (1969) where the United States Supreme Court, in holding that the exclusionary rule enunciated in *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), was prospective only, saw no distinction between final convictions and those still pending on appeal:

"All of the reasons for making *Katz* retroactive also undercut any distinction between final convictions and those still pending on review. Both the deterrent purpose of the

A. 3

II

Defendants' principal claim is that warrantless participant monitoring violates the Federal constitutional prohibition against unreasonable searches and seizures. In *United States v White*, 401 US 745; 91 S Ct 1122; 28 L Ed 2d 453 (1971), the United States Supreme Court rejected this claim and held that police eavesdropping without a warrant on conversations between an accused and an informant by means of a radio transmitter concealed on the informant's person does not violate the Fourth Amendment.

Defendants contend that *White* does not control because: (i) no opinion in that case obtained the signatures of a majority of the sitting justices; (ii) the decision in *White* was based on pre-*Katz*⁷ law because *Desist*⁸ had held that *Katz* only applied prospectively and the monitoring in *White* preceded the decision in *Katz*; and (iii) *White* involved monitoring of a face-to-face conversation while the monitoring in these cases was of telephone conversations.

Mr. Justice White wrote the lead opinion in *White* which was signed by Chief Justice Burger and Justices Stewart

⁶ (Cont'd)

exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date. Exclusion of electronic eavesdropping evidence seized before *Katz* would increase the burden on the administration of justice, would overturn convictions based on fair reliance upon pre-*Katz* decisions, and would not serve to deter similar searches and seizures in the future." *Desist v United States*, 394 US 244, at 253.

⁷ See fn 6.

⁸ See fn 6.

and Blackmun. Mr. Justice Black concurred on the ground that electronic eavesdropping does not constitute a "search" or "seizure" within the meaning of the Fourth Amendment. Mr. Justice Brennan concurred on the ground that *Katz* was not retroactive, adding that the Fourth Amendment interposes a warrant requirement. Justices Douglas, Harlan and Marshall signed separate dissenting opinions.

In *Katz*, the Court had held that electronic eavesdropping accomplished by attaching a listening and recording device to the outside of a public telephone booth, without the authorization of either participant in the conversation or of a warrant, was violative of the Fourth Amendment. The Court declared that the right to protection against unreasonable searches and seizures "cannot turn upon the presence or absence of a physical intrusion into any given enclosure", that the "trespass" doctrine enunciated in earlier decisions had been eroded and could no longer be regarded as controlling, and that the "Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied by using the telephone booth and thus constituted a 'search and seizure', within the meaning of the Fourth Amendment". *Katz v United States, supra*, p 353. The Fourth Amendment, said the Court, "protects people, not places". *Katz v United States, supra*, 351.

While Mr. Justice White's lead opinion in *White* said that the United States Court of Appeals had also erred because, by reason of *Desist* making *Katz* wholly prospective, *Katz* did not apply to the electronic surveillance in *White*, the primary thrust of the opinion was that there was no invasion of "the defendant's constitutionally justifiable expectations of privacy". "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently

doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his." *White v United States, supra*, pp 751, 752. Since the law violator knows that what he says is being heard and may be repeated, no different result is required because the conversation is being listened to or recorded electronically with the consent of the faithless participant.

This Court, in *Beavers*, construing the Michigan constitutional prohibition, rejected the argument that participant monitoring was a "variant of the privilege of a party to repeat a conversation", and instead was "persuaded by the logic of Justice Harlan which recognizes a significant distinction between assuming the risk that communications directed to one party may subsequently be repeated to others and the simultaneous monitoring of a conversation by the uninvited ear of a third party functioning in cooperation with one of the participants yet unknown to the other". *People v Beavers, supra*, pp 563, 565.⁹

III

It is our duty to "determine with the best exercise of our mental powers of which we are capable that law which in all probability will be applied to these litigants or to others similarly situated" in the event of a further ap-

⁹ "The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. . . ."

"Were third-party bugging a prevalent practice, it might well smother that spontaneity — reflected in frivolous, impetuous, sacrilegious, and defiant discourse — that liberates daily life. Much offhand exchange is easily forgotten

peal of the Fourth Amendment issue from this Court to the United States Supreme Court.¹⁰

⁹ (Cont'd)

and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.

* * *

"By casting its 'risk analysis' solely in terms of the expectations and risks that 'wrongdoers' or 'one contemplating illegal activities' ought to bear, the plurality opinion, I think, misses the mark entirely. *On Lee* does not simply mandate that criminals must daily run the risk of unknown eavesdroppers prying into their private affairs; it subjects each and every law-abiding member of society to that risk." *United States v White*, *supra*, pp 787-789 (Harlan, J.)

¹⁰ *Spector Motor Service, Inc v Walsh*, 139 F2d 809, 814 (CA 2, 1943), *remanded on other grounds*, *Spector Motor Service, Inc v McLaughlin*, 323 US 101; 65 S Ct 152; 89 L Ed 101 (1944). Judge Learned Hand, in dissent, agreed on the governing principle:

"I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it." *Spector Motor Service, Inc v Walsh*, 139 F2d 809, 822, 823 (Hand, J.)

Similarly, see *Mason v United States*, 198 Ct Cl 599; 461 F2d 1364, 1375 (1972), *rev'd on other grounds*, 412 US 391; 93 S Ct 2202; 37 L Ed 2d 22 (1973); *Martin v Virginia*, 349 F2d 781, 784 (CA 4, 1965); *Perkins v Endicott Johnson Corp.* 128 F2d 208, 217 (CA 2, 1942), *aff'd*, *Endicott Johnson Corp v Perkins*, 317 US 501; 63 S Ct 339; 87 L Ed 424 (1943).

The United States Courts of Appeal for 10 of the 11 circuits have followed Mr. Justice White's lead opinion in *White* in holding that the Fourth Amendment does not require a warrant for electronic participant monitoring.¹¹ No distinction has been made between electronic monitoring of

¹¹ *United States v Diaz*, 535 F2d 130, 133 (CA 1, 1976); *United States v Bonnano*, 487 F2d 654, 657-658 (CA 2, 1973); *United States v Santillo*, 507 F2d 629, 631-632 (CA 3, 1975); *United States v Dowdy*, 479 F2d 213, 229 (CA 4, 1973); *United States v Wilson*, 451 F2d 209, 212 (CA 5, 1971); *Stephan v United States*, 496 F2d 527, 528 (CA 6, 1974); *United States v Gocke*, 507 F2d 820, 823 (CA 8, 1974); *Holmes v Burr*, 486 F2d 55, 59-60 (CA 9, 1973); *United States v Puchi*, 441 F2d 697, 700 (CA 9, 1971); *United States v Quintana*, 457 F2d 874, 878 (CA 10, 1972); *United States v Bishton*, 150 US App DC 51; 463 F2d 887, 892 (1972).

A number of state courts have reached the same conclusion. *State v Wilder*, 18 Ariz App 410; 502 P2d 1087, 1088 (1972); *Kerr v State*, 256 Ark 738; 512 SW2d 13, 20-21 (1974); *People v Murphy*, 8 Cal 3d 349; 105 Cal Rptr 138; 503 P2d 594, 600-601 (1972); *People v Morton*, Colo, 539 P2d 1255, 1257 (1975); *State v Delmonaco*, 165 Conn 163; 328 A2d 672, 673 (1973); *People v Richardson*, 60 Ill 2d 189, 328 NE2d 260, 263 (1975); *McCarty v State*, Ind App, 338 NE2d 738, 741 (1975); *State v Wigley*, 210 Kan 472, 502 P2d 819, 821-822 (1972); *Avery v State*, 15 Md App 520, 292 A2d 728, 742-743 (1972); *Everett v State*, 248 So 2d 439, 442-443 (Miss, 1971); *State v Anepete*, 145 NJ Super 22; 366 A2d 996, 998 (1976); *People v Phillips*, App Div 2d; 390 NYS2d 6, 7 (1976); *Escobedo v State*, 545 P2d 210, 216 (Okla Crim, 1976); *Commonwealth v Donnelly*, 233 Pa Super 396; 336 A2d 632, 640-641 (1975); *Thrush v State*, 515 SW2d 122, 125 (Tex Crim App, 1974).

Other state courts, like Michigan, have concluded that warrantless electronic, participant monitoring is violative of a state constitutional prohibition. *Tollett v State* 272

face-to-face conversations and of telephonic communications.¹²

Since *White* was decided, Justices Black, Douglas and Harlan have left the Court, and Justices Powell, Rehnquist and Stevens have taken their places on the Court. All four justices who signed Mr. Justice White's opinion remain on the Court.

On at least 14 occasions the United States Supreme Court has declined to grant certiorari to review decisions of the United States Courts of Appeal holding that the Fourth Amendment does not preclude warrantless, electronic participant monitoring.¹³ While denial of certiorari is not affirmance, it is a fact of some significance especially since there is no indication in subsequent decisions of the United

¹¹ (Cont'd)

So 2d 490, 492-493 (Fla, 1973); *State ex rel Arnold v Rock County Court*, 51 Wis 2d 434, 187 NW2d 354, 356-357 (1971); cf. *State v Smith*, 72 Wis 2d 711, 242 NW2d 184, 186-187 (1976).

¹² *United States v Bonnano*, supra; *United States v Santillo*, supra; *United States v Dowdy*, supra; *United States v Wilson*, supra; *Stephan v United States*, supra; *United States v Puchi*, supra; *United States v Quintana*, supra.

¹³ *United States v Warren*, 453 F2d 738 (CA 2, 1972), cert den, 406 US 944; 92 S Ct 2040; 32 L Ed 2d 331 (1972); *United States v Koska*, 443 F2d 1167 (CA 2, 1971), cert den, 404 US 852; 92 S Ct 92; 30 L Ed 2d 92 (1971); *United States v Santillo*, supra, cert den sub nom *Buchert v United States*, 421 US 968; 95 S Ct 1960; 44 L Ed 2d 457 (1975); *United States v Dowdy*, supra, cert den, 414 US 866; 94 S Ct 132; 38 L Ed 2d 118 (1973); reh den, 414 US 1117; 94 S Ct 851; 38 L Ed 2d 745 (1973); *United States v Wilson*, supra, cert den sub nom *Fairman v United States*, 405 US 1032; 92 S Ct 1298; 31 L Ed 2d 490 (1972); *United States v Caracci*, 446

States Supreme Court which would support the conclusion that the "doctrinal trend"¹⁴ has shifted from the view expressed in Mr. Justice White's opinion.

We are of the opinion that were there to be a further appeal on Fourth Amendment grounds, the view of the law which in all probability would be applied by the United States Supreme Court would be that expressed in Mr. Justice White's opinion.

The Court of Appeals is reversed in *Plamondon* and *Blazier*, and affirmed in *Drielick*. The convictions are affirmed.

KAVANAGH C. J., and WILLIAMS, FITZGERALD, and BLAIR MOODY, JR., JJ., concurred with LEVIN, J.

¹³ (Cont'd)

F2d 173 (CA 5, 1971), cert den, 404 US 881; 92 S Ct 202; 30 L Ed 2d 162 (1971); *United States v Avila*, 443 F2d 792 (CA 5, 1971), cert den, 404 US 944; 92 S Ct 295; 30 L Ed 2d 258 (1971); *United States v Lippmann*, 492 F2d 314 (CA 6, 1974), cert den 419 US 1107; 95 S Ct 779; 42 L Ed 2d 803 (1975); *Stephan v United States*, supra, cert den sub nom *Marchesani v United States*, 423 US 861; 96 S Ct 116; 46 L Ed 2d 88 (1975); *United States v Gocke*, supra, cert den 420 US 979; 95 S Ct 1407; 43 L Ed 2d 660 (1975); *United States v King*, 472 F2d 1 (CA 9, 1972), cert den sub nom *Butler v United States*, 414 US 864; 94 S Ct 37, 40, 174; 38 L Ed 2d 84 (1973); *United States v Puchi*, supra, cert den, 404 US 853; 92 S Ct 92; 30 L Ed 2d 92 (1971); *United States v Quintana*, supra, cert den, 409 US 877; 93 S Ct 128; 34 L Ed 2d 130 (1972); *Holmes v Burr*, supra, cert den, 414 US 1116; 94 S Ct 850; 38 L Ed 2d 744 (1973).

¹⁴ See *Spector Motor Service, Inc v Walsh*, supra.

RYAN, J. (*concurring*). I concur with Justice LEVIN that the evidence obtained as a result of the electronic participant monitoring in these cases was not obtained unconstitutionally despite the holding in *People v Beavers*, 393 Mich 554; 227 NW2d 511 (1975), because *Beavers*, having prospective application only, is inapplicable to these cases.

I am of the view as well that the evidence was not obtained in violation of the Fourth Amendment of the Constitution of the United States for the reasons announced by Mr. Justice White in his lead opinion in *United States v White*, 401 US 745, 746; 91 S Ct 1122; 28 L Ed 2d 453 (1971).

For the foregoing reasons alone I concur in the majority's disposition of these cases.

COLEMAN, J., concurred with RYAN, J.

OPINION OF THE COURT OF APPEALS

Appeal from Saginaw, Eugene Snow Huff, J.

Submitted Division 3 November 6, 1974 at Lansing

(Docket No. 17954) Decided November 26, 1974

Before: QUINN, P.J., and MCGREGOR and O'HARA,* JJ.

QUINN, P.J. A jury convicted defendant of first-degree murder, MCLA 750.316; MSA 28.548. He was sentenced and he appeals. The first five issues raised and briefed on

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

appeal arise from the admission, over objection, of a recorded telephone conversation between defendant and the wife of the victim.

Prior to the killing, defendant had been on intimate terms with Nancy McNeil, the estranged wife of the victim. At the time of the homicide, she was pregnant by defendant. Mrs. McNeil testified that defendant came to her apartment November 20, 1972 and told her that he had killed her husband with a gun that defendant had previously given to Mrs. McNeil. She testified further that when she looked for this gun and could not find it, she took an overdose of tranquilizer for which she was hospitalized.

When released from the hospital, Mrs. McNeil testified that she went to the police and informed them of defendant's admissions to her. Mrs. McNeil's testimony further indicated that at the request of the police, she telephoned defendant in an attempt to get him to admit the killing. She knew that this telephone call was to be recorded. During the call, defendant admitted killing Mr. McNeil.

In an attempt to evade the ruling of *United States v White*, 401 US 745; 91 S Ct 1122; 28 L Ed 2d 453 (1971), that consent by one party to a monitored conversation was sufficient to permit admission of the conversation in evidence, defendant argues that Mrs. McNeil's consent was involuntary. The argument fails because the record establishes that the consent was voluntary, and no objection was made at trial based on involuntariness of consent.

There was no necessity to obtain a search warrant to intercept the telephone conversation between defendant and Mrs. McNeil after she had consented thereto, *People v Karalla*, 35 Mich App 541; 192 NW2d 676 (1971).

The interception of that telephone conversation with Mrs. McNeil's consent involves no constitutional right of defendant, *People v Karalla*, *supra*.

Defendant contends that the trial court should have conducted a hearing on the voluntariness of defendant's admission of the killing made in the intercepted telephone conversation. The question of defendant's voluntariness in making the admission was never raised at trial.

Defendant stated at trial that the manner and tone of defendant's speech and the whole content of the conversation as reflected by the recorded telephone conversation should lead the court to conclude that defendant's mental state, because of drugs or alcohol, was such that he was incapable of speaking the truth. This would have required the hearing now contended for, if a confession was involved.

In *People v Porter*, 269 Mich 284, 290; 257 NW 705 (1934), the Supreme Court distinguished confession and admission as follows:

"If the fact admitted necessarily amounts to a confession of guilt, it is a confession. If, however, the fact admitted does not of itself show guilt but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession but an admission * * *."

The admission by defendant that he killed McNeil would not establish that defendant murdered McNeil without proof of other facts not admitted by defendant. The trial court was dealing with an admission, the weight of which was properly left to the jury.

The record does not sustain defendant's contention that he was incompetent at the time of the recorded telephone conversation and failure to exclude the conversation on that ground is not error.

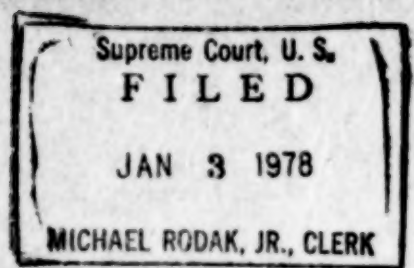
Finally, defendant asserts reversible error occurred when the trial court instructed on all lesser included offenses as well as on first-degree murder after defendant requested that the charge be limited to murder in the first degree. It

is understandable that defendant cites no authority for this position; all authority is to the contrary. The judge is statutorily bound to instruct on the law applicable to the case, MCLA 768.29; MSA 28.1052. If the record warrants, this includes lesser included offenses. The jury may find the defendant guilty of a lesser offense, MCLA 768.32; MSA 28.1055.

Affirmed.

All concurred.

77-816



**IN THE SUPREME COURT OF THE
UNITED STATES
DECEMBER TERM, 1977**

MICHAEL DRIELICK,
Petitioner,

v.

No. A-333

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

**ANSWER TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
MICHIGAN**

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By: PETER C. JENSEN (P 25001)
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QUESTION INVOLVED

- I. DOES THE FOURTH AMENDMENT PROHIBIT THE INTRODUCTION OF A TAPE-RECORDED CONVERSATION INTO EVIDENCE WHEN ONE PARTY TO THE CONVERSATION, WHO WAS A WITNESS AT THE TRIAL, CONSENTED TO THE MONITORING?

The Plaintiff-Appellee answers "NO".

COUNTER-STATEMENT OF FACTS

The People accept the Statement of Facts recited in Appellant-defendant's Brief but would supplement them with these relevant facts:

1. Prior to the telephone conversation of November, 28, 1972, Appellant-defendant told Nancy McNeil that he killed her husband, Daniel Drielick. (T. p. 277)
2. At this time, witness Nancy McNeil said she was going to turn the Defendant into the police for murder. (T. p. 280)

ARGUMENT

I. THE FOURTH AMENDMENT DOES NOT PROHIBIT THE INTRODUCTION OF A TAPE-RECORDED CONVERSATION INTO EVIDENCE WHEN ONE PARTY TO THE CONVERSATION, WHO WAS A WITNESS AT THE TRIAL, CONSENTED TO THE MONITORING.

In the early morning of November 13, 1972, the body of Daniel McNeil was discovered in the rear seat of his automobile which was parked in front of his parents' home in Saginaw. The victim was killed at close range by a .16 gauge shotgun. (T. p. 157) During the investigation of this homicide, Nancy McNeil, wife of the deceased, went to the Buena Vista Police Station to talk with Detective William Brown. At this time, she told the detective that her lover, Michael Drielick, had admitted to her that he had killed her husband. The detective asked Mrs. McNeil if she would call the Defendant and permit the detective to listen to the conversation and record this conversation for future use. Mrs. McNeil permitted the detective to so listen and record. The date of this telephone conversation was November 28, 1972. At the trial, Mrs. Nancy McNeil testified to this telephone conversation. (T. pp. 301-304, 382-385), and in corroboration of her testimony the tape was played to the jury in open court. (T. pp. 387-398; see Appendix, 1b-8b) The People assert that the monitoring of this telephone conversation is not in contravention of Appellant's constitutional rights to privacy. Furthermore, as the People will demonstrate the factual framework of this case is readily distinguishable from *People v Beavers*, 393 Mich 554 (1975); nor do the facts of this case conjure the "ominous spectre of the Orwellian Big Brother" which this Court sought to prevent in *Beavers*, at p. 563.

A. The Federal Case Law And Statutory Provisions Permit A Third Party To Monitor Conversations When Such Conversations Have Been Consented To By At Least One Participant Of The Conversation.

The monitoring of conversations is, of course, an issue which has been analyzed by this Court and the United States Supreme Court in terms of the Fourth Amendment. These constitutional provisions provide for the protection of personal privacy of an individual. Without question the Fourth Amendment applies to words as well as more common tangible items. *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). Furthermore, this protection of privacy includes protection against surreptitious surveillance of a private conversation by an outsider. *Silverman v United States*, 365 US 505; 81 S Ct 679; 5 L Ed 2d 734 (1961). This protection is not, however, absolute. The Congress has created statutory guidelines for electronic monitoring.

The federal rules concerning telephone monitoring are provided in the Federal Communications Act of 1934. 47 USC 605. The federal rule renders inadmissible in federal court evidence obtained by wiretapping. This ruling also applies to the States. *Lee v Florida*, 392 US 378; 88 S Ct 2096; 20 L Ed 2d 1166 (1968). However, the federal courts had sought to avoid the harsh results of this section:

“... the trend in recent years appears to be toward avoiding the application of this rule by finding that under the specific circumstances present in cases under consideration no ‘interception’ occurred, or that such interception was consented to, thus taking it out of §605.” Annot, 20 L Ed 2d 1718, 1725 (1969).

At the same time, the Congress amended the Act of 1934 to avoid its unjust results. Under the Omnibus Crime Con-

trol and Safe Streets Act of 1968 a law enforcement official is allowed to intercept wire and oral communications where such officer is a party to the conversation or where one of the parties to the conversation has given prior consent to such interception. 18 USC 2511 (c) (1970). Interception, whether by wiretapping or recording from an extension telephone, or by any means where done with consent of one of the parties is not subject to prior judicial approval, i.e. no warrant is required for such surveillance and interception. This legislative amendment is consistent with the recommendations of the American Bar Association Standards of Criminal Justice, Electronic Surveillance:

“4.1 Overhearing or recording.

The use of electronic surveillance techniques by law enforcement officers for the overhearing or recording of wire or oral communications with the consent of one of the parties should be permitted.

4.2 Authenticity.

The techniques should be so employed by law enforcement officers that the recording will be insofar as practicable complete, accurate and intelligible.”

Thus, both the federal standards and those standards recommended by the American Bar Association distinguish those situations wherein one party consents from the unconsented to, “uninvited”, ear of a third party.

There is no “interception” for the purpose of the exclusionary rule when consent has been received. *Rathbun v United States*, 355 US 107 (1957); see generally Annot 9 ALR3d 423 (1966). Distinguishing “eavesdropping” from the consensual monitoring, the Court explained in *Lopez v United States*, 373 US 427; 82 S Ct 1381; 10 L Ed 2d 462 (1963):

“Indeed, this case involves no ‘eavesdropping’ whatever in any proper sense of that term. The govern-

ment did not use an electronic device to listen in on conversations it could not have otherwise heard. Instead, the device was used to obtain the most reliable evidence possible of a conversation in which the government's own agent was a participant and which that agent was fully entitled to disclose."

A similar ruling was announced in *Hoffa v United States*, 385 US 293; 87 S Ct 408; 17 L Ed 2d 374 (1966).

In *Hoffa*, a union associate named Edward Partin, went to Nashville to discuss union business. While there, Partin, who made reports to a federal agent and was compensated for these services, overheard discussion of attempts to bribe jurors in a trial pending against Hoffa, and testified in a later trial to these conversations. Ruling Partin's testimony admissible, the Court noted Partin did not obtain this knowledge surreptitiously nor by stealth, but rather was at the hotel by invitation. Specifically, the Court observed:

"Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrong-doer's misplaced belief that a person to whom he voluntarily confides his wrong-doing will not reveal it."

In more a *priori* remarks on the Fourth Amendment the Court noted:

"Where the argument falls is in its misapprehension of the fundamental nature and scope of Fourth Amendment protection. What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental intrusion. And when he put something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable

seizure. So it was that the Fourth Amendment could not tolerate the warrantless search of the hotel room in *Jeffers*, the purloining of the petitioner's private papers in *Gould*, or the surreptitious electronic surveillance in *Silverman*." At p. 301.

A striking analogy appears between the facts of *Hoffa* and the case at bar, i.e. both cases involve testimony of a former associate, a relationship that existed prior to the involvement of the police agencies. Both cases involve consent of one party to disclose the information of the communications with the defendant. *Hoffa* and *Lopez* are consonant with an earlier ruling of the Court wherein the Court allowed a third party to testify to communications heard between an informant and a defendant. *On Lee v United States*, 343 US 747; 74 S Ct 389; 96 L Ed 1270 (1952).

In *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), the United States Supreme Court juxtaposed property rights and the Fourth Amendment. This decision eliminated the concept of trespass to determine whether there has been a constitutional violation. The decision in *Katz* was that the defendant had a "reasonable expectation of privacy" in a public telephone booth and that the electronic monitoring of the conversation — without the consent of any of the parties — was a violation of defendant's Fourth Amendment right to privacy. Citing with approval *Lewis v United States*, 385 US 206; 87 S Ct 424; 17 L Ed 2d 312 (1967), the Court stated:

"What a person knowingly exposes to the public, even in his own home or the office, is not a subject of Fourth Amendment protection." At p. 511.

Although defense counsel would assert that *Katz* forbids any form of monitoring, including consent monitoring, Mr. Justice White's concurring opinion recognizes the exception:

"When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. . . . It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording or transmitting to another." At p. 363 (1967).

In *White v United States*, 401 US 475; 91 S Ct 1122; 28 L Ed 2d 453 (1971) the United States Supreme Court reaffirmed the pronouncements of *On Lee* and ruled that no Fourth Amendment violation occurred when conversations between a government informant and the defendant were recorded. More importantly, the Court noted that *Katz* did not overrule *On Lee*:

"We see no indication in *Katz* that the Court meant to disturb that understanding of the Fourth Amendment or to disturb the result reached in the *On Lee* case, nor are we now inclined to overturn this view of the Fourth Amendment." At p. 1125.

Besides depending upon the past Court decisions of *Hoffa*, *Lopez* and *On Lee*, the Court noted that "constitutional barriers to relevant and probative evidence which is also accurate and reliable" should not be raised. Indeed, this policy determination of the truth-seeking function of the jury system is the primary policy factors of the American Bar recommendations (Minimum Standards, pp. 125-127)

Although Appellant-defendant intimates an apparent disparity between *On Lee* and its progeny and *Katz* and its progeny, the federal circuits have not been so bothered. In *United States v Jackson*, 390 F2d 317 (2nd Cir, 1968), the Court admitted into evidence the taped telephonic transactions of the federal undercover agent. In that ruling the Court reaffirmed *On Lee*:

"In reliance on the dissents in *On Lee* . . . and *Lopez* . . . and the concurrence in *Warden Md Penitentiary v Hayden*, 387 US 294, 310-312, 87 S Ct 1642, 18 L Ed 2d 782 (1967), and similar 'nosecounting', counsel asks us to say that *On Lee* is no longer law. The Supreme Court, however, has not so held, and we decline to anticipate it might."

The Ninth Circuit has reached a similar result. In *Holmes v Burr*, 486 F2d 55 (9th Cir, 1973) (cited with approval Ringel, Searches and Seizures, Arrests and Confessions (1974 Cum Supp)), the Court ruled where one party consents to the communication, such conversation is admissible. Similar results can be found in other federal circuits. *United States v DeVore*, 423 F2d 1069 (4th Cir, 1969); *Dancy v United States*, 390 F2d 370 (5th Cir, 1968); *United States v Gardner*, 416 F2d 879 (6th Cir, 1969); *United States v Hickman*, 426 F2d 515 (7th Cir, 1970); *United States v Pucki*, 441 F2d 697 (9th Cir, 1970), cert denied 404 US 853; 92 S Ct 92; 30 L Ed 2d 92 (1971); *Holt v United States*, 404 F2d 914 (10th Cir, 1968), cert denied 393 US 1067; 89 S Ct 872; 21 L Ed 799 (1969).

Thus a survey of the federal case law and statutory provisions demonstrate a clearly delineated framework whereby the actions of the government are said to interfere with one's privacy and those areas where no privacy can be claimed for the purpose of the exclusionary. Appellant's analysis of the federal case law is, unfortunately, not so well-defined. The issue before this Court — the only issue — is whether one party's consent is sufficient to avoid an illegal seizure. *This case does not involve unconsented to seizure as emphasized in Appellant's Brief, i.e. Katz v United States and Berger v New York.*

A thorough examination of the federal cases, statutes and the American Bar Association Minimum Standards reflects an acceptance of the need and justification for consented to monitorings.

B. The Jurisdictions Which Have Been Presented Analogous Facts Agree That Such Consented To Monitorings Is Not An Unlawful Seizure For The Purposes Of The Fourth Amendment.

The issue of whether a tape recording of a monitored telephone conversation in which one party consented to the evidence has been raised in other jurisdictions. In the absence of some statutory provisions to the contrary, the trend would appear to be to allow the introduction of such recording as a corroborating form of evidence, even notwithstanding *Katz v United States, supra*. In *People v Gibson*, 246 NE2d 349 (NY, 1969), the appellate bench was requested to rule upon the constitutionality of a state statute which authorized monitoring of a conversation when at least one party consented in light of *Katz*. This line of reasoning was tersely discounted:

“Appellants say, however, that the teaching of these cases has been made obsolete by *Katz v United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576, which held that the interception of a private telephone conversation by attaching an electronic device on the outside of a public telephone booth used by one of the parties to the conversation was a violation of Fourth Amendment rights.

But that case seems readily distinguishable. A man who buys telephone service in a public booth buys private telephone service. That the booth is available to public use by anyone willing to pay for it does not make the private conversation public; and all the basic reasons which protect a person's privacy on a telephone he hires by the month apply to the phone which is his exclusive instrument while he pays for it. Such an interception would, for example, readily come within the New York Penal Law's interdiction against eavesdropping.

But it has no relevancy to a voluntary disclosure of the conversation by a party to it, with or without the aid of recording or transmitting techniques. Such a disclosure seems governed by *On Lee*, *Lopez*, and cases which followed them.”

The Illinois Courts have also grappled with the problem. In Illinois eavesdropping is unlawful unless there is consent of any one party and at the request of the State's Attorney. Ill Rev Stat 1969, ch 38, §14-2. A defendant challenged the constitutionality of the statute. *People v Holliman*, 316 NE2d 812 (Ill, 1974). Not only did the Court rule that this statute was constitutional, but also ruled that there was no inconsistency in the rulings of *Katz, supra* and *White, supra*. *People v Holliman*, p 816. In that same year the Illinois Court heard a similar issue in *People v Drish*, 321 NE2d 179 (Ill, 1974). Using *Katz* as an analytical tool, the Court reached the same decision as before. The Court noted looking to the facts of the case, that there had been no prolonged police surveillance, nor had the police agencies used the monitoring as a form of fishing expedition.

In *State v Roy*, 510 P2d 1066, 1068 (Haw, 1973), the Hawaiian high court cited *White, supra*, as precedent when it ruled that the expectation that a person with whom the defendant is talking will not later reveal the conversation to the police nor protected by the Fourth Amendment. The Hawaiian constitutional analogue to the Fourth Amendment prohibits “invasions of privacy”; however, in *Roy*, the Court ruled that such monitoring was not protected under either Federal or State Constitutions. The same result was reached by the Arkansas Supreme Court in *Kerr v State*, 512 SW2d 13 (Ark, 1974). The Kansas high court ruled where one party has consented to the conversation, be he an agent of the police or otherwise, such tape recording is admissible. *State v Stokes*, 523 P2d 364, 371 (Kan,

1974). The State of Georgia has made similar rulings. *Cross v State*, 198 SE2d 338, 340 (1973).

A Florida constitutional provision states:

“§12. Searches and Seizures. — The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.” (Emphasis added).

Even with the wording of this constitutional provision, the Florida Supreme Court has ruled that where a participant to the conversation takes the stand and testifies that consent was given the recording can be introduced into evidence. *Tollett v State*, 272 So 2d 490, 494 (Fla, 1973).

Thus, an analysis of other state courts demonstrates that the better reasoned approach to the fact situation is to permit the use of recorded conversations into evidence when one of the parties to the conversation has consented. Although the People recognize these decisions are in no way binding to this Court, the People believe that such an illustration of other court rulings provide some point of reference for the purpose of deciding this issue.

C. The Law In The State Of Michigan, Prior To *Beavers* Permits The Use Of A Tape-recorded Device When One Party Consents To Such Monitoring.

Prior to the Circuit Court's ruling on the admission of the tape-recorded conversation into evidence, where one

party has consented to the monitoring, the Michigan Court of Appeals had ruled said monitoring was constitutional. In *People v Bruno*, 30 Mich App 375, 382 (1971), the defendant contended that his Fourth Amendment rights were violated by the introduction into evidence of a tape recording of a telephone conversation between the victim and the party who hired the defendant. This recording was made with the consent of the victim. Citing *Rathbun v United States*, *supra*, the Court affirmed the conviction stating consent by a party is sufficient. *Bruno* was cited several months later in *People v Karella*, 35 Mich App 541, 545 (1971) and was bolstered with the then newly reported opinion of *White v United States*. In *People v Patrick*, 46 Mich App 678, 684 (1973), the Court rejected defendant's reliance upon *Katz* and ruled:

“The requirement of a judicial order is not necessary where one party to the conversation consents to the interception of the conversation by police authorities, their agents, or the use of electronic equipment.” (Citing *White*)

When no parties have consented to electronic monitoring, and the police eavesdrop, the Michigan Appellate Court has ruled this form of eavesdropping to be unlawful and not to be admitted into evidence. *People v Tebo*, 37 Mich App 141 (1971). However, no consent was involved in this case, but rather the People argued that the regularly employed police procedure of listening to all prisoners' calls without the consent of anyone to prevent the county from being charged for a long distance phone call was not sufficiently important to allow the police to eavesdrop. Indeed, other means could have been employed to protect this interest in limiting expenses.

The importance of these past cases not only illustrates the jurisprudential analysis provided at the Appellate Court level but also illustrates the general reliance on the

rule which permitted the introduction of a taped conversation into evidence when one party consents to that conversation. *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965).

In *People v Livingston*, 64 Mich App 247 (1975), decided eleven days before *People v Plamondon*, 64 Mich App 413 (1975), the Court of Appeals noted where neither party has consented, it does not follow that such recording be excluded from the jury:

"Of the initial tape recordings made by Mr. Morgan, two things are clear; neither party to the conversation consented to his intervention and there was absolutely no police involvement. It thus appears that Mr. Morgan's interception of the first calls was in violation of MCLA 750.539c; MSA 28.807(3). However, statutory violations do not call into play the per se exclusionary rule applicable to constitutionally defective searches and seizures. *People v Burdo*, 56 Mich App 48; 223 NW2d 358 (1974). The Court in *Burdo* recognized the issue as one of public policy and concluded that suppression was not necessary to protect the basic rights of the defendant. The Court also noted the potential civil liability for the statutory violation. See also *People v Mordell*, 55 Mich App 462; 223 NW2d 10 (1974).

The evidence initially gathered by Mr. Morgan in violation of the statute need not be suppressed. The Legislature provided for criminal sanctions against the interceptor and created civil liability for actual and punitive damages. MCLA 750.539h (b) and (c); MSA 28.807(8)(b) and (c). The Legislature did not enact an exclusionary rule. We will not judicially create a remedy that the Legislature chose not to create." At p. 255.

The Court further noted that in the absence of a statutory prohibition, or constitutional objection, such seizure of the

conversation by the police, with the consent of one of the parties to the information, was valid.

In a counter case, *People v Plamondon*, a rationale which, for the most part, is paraphrased by Appellant-defendant herein, the Appellate Court reached an opposite result. Since this case is presently before the Court, little need be said. That case not only failed to discuss the statutory authority for the action of the police but also failed to recognize the federal provisions which clearly admit consented to monitorings.

D. When All Factors Are Balanced, The Jury Has A Right To Listen To The Monitored Conversation To Which One Party Consented.

As with all constitutional issues, this Court must balance the countervailing interests and strike the proper medium which is consistent with the spirit and purpose of the constitution. Of course, the spirit of the Fourth Amendment is rooted in the fundamental ideas of privacy of the citizen from an unjustified invasion by the State. When one party consents to permit monitoring of a conversation, it cannot be said that there was an *unjustifiable intrusion*. Once consent has been obtained, the State cannot be said to *intrude*.

The factual framework of this case does not suggest the Police State mentality which apparently disturbed the Court in *Beavers*. Indeed, this case is readily distinguishable from *Beavers*. Unlike *Beavers*, the relationship between the defendant and the witness, who consented to the monitoring, was not an artificial one, i.e. not one designed to exploit a criminal situation. This case does not involve the cultivation of a limited relationship for a limited purpose. Analyzing the roles of an undercover agent and privacy, one law review commentator noted:

"Deception involved in undercover investigations often infringes on the privacy of those subjected to the investigation and of others who may come into contact with the investigator. A comprehensive definition of privacy is beyond the scope of this article, but it clearly encompasses the interest in being aware of all relevant characteristics of persons with whom one deals. Thus, any contact between an undercover investigator and another person who is unaware of the investigator's official capacity to some extent involves an infringement of this interest. For example, if the subject unwittingly permits observations of himself because of the deception, the subject's interest in personal privacy has been infringed. The impact of undercover investigations on personal privacy may be also extended beyond the privacy of those actually subjected to such investigations. If the use of undercover investigations causes persons to fear becoming the subjects of such investigations, those persons' privacy interests have also been infringed. . . .

A related but distinguishable interest is that of privacy in interpersonal relations. A person has an interest in knowing all relevant characteristics of those with whom he forms any personal relationship and of those to whom he discloses information concerning relationships with others. When undercover investigators enter into personal relationships with subjects unaware of their official capacity and covertly obtain information concerning the subject's relationship with others, they infringe on the interest in interpersonal relations. Of course, the impact can be more serious. To the extent that awareness of undercover investigations causes persons not to form personal relationships that they would otherwise form, the interest has been infringed in a more significant manner. Again, the effect may be indirect. Even persons not themselves the subject of such investigations may be affected by awareness that such investigations occur and the possibility that they may be subjected to one.

If the interpersonal relationship is also a professional one, the investigation becomes more serious. Use of physicians as undercover investigators, for example, may discourage the formation or continuation of a physician-patient relationship. In view of the value of those relationships, their infringement would appear more objectionable than the transgression of a nonprofessional friendship." Dix, *Undercover Investigations and Police Rulemaking*, 53 Texas L Rev 203, 211 (1975).

On the other hand, the interest in judicial integrity must be weighed. Participant monitoring has a two-fold function: not only to develop incriminating evidence which is not convincing and not subject to attack, but more importantly, to prevent the official integrity of the consenting party by untoward behavior. All parties have an interest in a fair trial. A fair trial means, at the minimum, that the jury will hear all relevant and accurate testimony. All parties are concerned about the integrity of the evidence produced. In its commentary on the Standards of Electronic Surveillance the Commentator stressed the need for integrity of evidence:

"No man knows better, however, the fallibility of human testimony than that man who is trained in the law. The prospect that science through electronic surveillance techniques can provide us with evidence not subject to the frailties of human nature ought, therefore, to be applauded. The use of such techniques in this area, in short, should be encouraged, not discouraged, and they should not be encumbered with administrative procedure. Where trained investigators are conducting routine interviews, reliance may properly be placed in the agents' memories aided by notes taken contemporaneously. See *Campbell v United States*, 373 U.S. 487 (1963). But where informants, whose credibility may be suspect, are used, see e.g. *Osborn v United States*, 385 U.S. 323 (1966), where victims of crimes

are engaged in key conversations with the perpetrators themselves, see e.g. *Rathbun v United States*, 355 U.S. 107 (1957), or where the investigators as such are individually involved and their credibility will be a significant factor in the subsequent trial, see e.g. *Lopez v United States*, 373 U.S. 427 (1963), every effort should be made to record the conversations through the best available means. For a recording will reproduce the very words spoken with all the added significance that comes from inflection, emphasis and the other aspects of oral speech. See *State v Reyes*, 209 Ore. 595, 308 P.2d. 182 (1957)."

There would appear to be no dispute over whether Nancy McNeil could testify to the content of her conversation with Michael Drielick. Although Appellant-defendant stresses the confidential nature of the conversation, it is not claimed that the testimony is privileged testimony. MCLA 600.-2162; MSA 27A.2162. The policy considerations of the privilege are as narrow as the privilege itself, i.e. the encouragement of marital confidences and the recognition of the delicacy of the relationship. *McCormick, Evidence*, §86, p 172 (2nd ed); see also Federal Rule of Evidence 505. Thus, the statute does not recognize the "intimate relationship" argued by Appellant-defendant; nor can any policy consideration be mustered to prohibit the testimony of Nancy McNeil's conversation with Michael Drielick. Although Appellant-defendant tries to assert his right of privacy, one cannot forget the Defendant admitted killing Daniel McNeil, Nancy's husband.

Appellant-defendant obfuscates the issue of consent by discussing the concept of "joint property" rights. (In light of the rationale in *Katz*, a case heavily relied upon by Appellant, it would appear to be, at the minimum, an inappropriate analogy). However, once one recognizes that Nancy McNeil had a right to testify about the content of the con-

versation, it follows that whatever one names this "interest in the conversation", she would have an equal interest to share the conversation with whomever she pleases. In the absence of a privilege which would prevent the witness from granting an "audience" to the conversation, it follows that the witness' right to control the information gained through word-of-mouth, is equal to that of the defendant. Nancy McNeil had a right to control what facts were gained through the conversation. Since the Supreme Court in *People v Chism*, 390 Mich App 136 (1973), affirmed the consent search of the wife to her husband's property stating that the defendant "assumed the risk", it would appear that Judge Allen misinterpreted the thrust of this Court's ruling, and, clearly misapplied that case to the situation of telephone monitoring. *People v Plamondon*, 64 Mich App 413 (1975).

Once one recognizes the distinction between this case and that of undercover monitoring, the policy issues of a fair trial and lack of privilege clearly outweigh those arguments raised by Appellant. There was no illusion of a relationship that did not exist, there was no continual surveillance by the police in an effort to control the situation. On the other hand, there is no denial that Nancy McNeil had the right to testify and to reveal to the world everything conveyed to her by Appellant. In an effort to present a fair trial, the People should have the right to present the most accurate evidence.

In conclusion, the People urge this Court to scrutinize not only the facts before this Bench, but also the factors which this high Court has focused on in determining whether a defendant's rights have been violated. The "expectation of privacy" focused upon in *Katz* is not of the same quality as here. Indeed, the Michigan Supreme Court wrongfully applied that test in its earlier decision of *Beavers*. Furthermore, the Michigan Court too quickly counted

votes, so to speak, in *White*, without analyzing the Justices' rationale. If the separate opinions in *White* are properly aligned, the majority of this Court has ruled that prior judicial approval is a prerequisite where one party consents. To that extent, the rationale of *People v Drielick*, 400 Mich 599 (1977), is improper (although the conviction was affirmed). Whether *White* was pre-*Katz* or not is irrelevant. The true significance in *Katz* is that it rejected the concept of "Trespass" in determining whether the Fourth Amendment rights had been infringed upon. See also *Warden v Hayden*, 387 US 294; 87 S Ct 1642; 18 L Ed 2d 782 (1967).

The policy of providing a fair trial with accurate evidence should be a priority of penultimate status to this Court. The State should not be forced to depend upon the frailties of memory with the presence of an accurate tape. In this case, Drielick asserted he was on drugs; this tape would also be important to him since it gave the jury the opportunity to compare how he sounded on the stand and how he responded to Nancy McNeil's questioning. In the absence of any privilege, the reliance on an "intimate relationship" to prevent accurate testimony cannot wash. These policy considerations are bolstered by the statutory provisions of this State, as well as the federal rulings which allow such evidence when one party consents.

The State Legislature has provided a statutory framework to protect the privacy of the citizen, on the one hand, while, on the other hand, insuring the police the ability to investigate within the statutory framework:

§28.807(3) Using device to eavesdrop upon conversation.) Sec. 539c. Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is

guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000.00, or both. (CL '48, §750.539c).

§28.807(7) Acts not prohibited.) Sec. 539g. This act shall not be construed to prohibit:

(a) Eavesdropping or surveillance not otherwise prohibited by law by a peace officer or his agent of this state or federal government while in the performance of his duties.

§28.807(8) Civil remedies.) Sec. 539h. Any parties to any conversation upon which eavesdropping is practiced contrary to this act shall be entitled to the following civil remedies:

(a) An injunction by a court of record prohibiting further eavesdropping.

(b) All actual damages against the person who eavesdrops.

(c) Punitive damages determined by the court or by a jury. (CL '48, §750.539h.)

Of no small importance is the fact that there is no exclusionary policy which the State attached to a violation of the statute, but rather created civil liability in its stead. See generally Annot 25 ALR Fed 759 (1975). Since the statutory provisions do not call into play the sanctions of the exclusionary rule, the relief sought by Appellant-defendant is improper. *People v Burdo*, 56 Mich App 48 (1974). The Court of Appeals in *People v Livingston*, 64 Mich App 247, 255 (1975) adopted this stance.

SUMMARY AND RELIEF SOUGHT

WHEREFORE, the People pray that this Honorable Court deny the Petition for a Writ of Certiorari as filed by Defendant Drielick.

Respectfully submitted,

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Dated this 23rd day of December A.D., 1977.

A P P E N D I X

EXCERPTS FROM TRANSCRIPT

(387)

. . .

(Telephone ringing sound).

MALE VOICE: Hello.

FEMALE VOICE: Is Mike there?

MALE VOICE: This is Mike.

FEMALE VOICE: What's the matter with you?

MALE VOICE: You'll never believe.

FEMALE VOICE: What did you do?

MALE VOICE: What?

FEMALE VOICE: What did you do?

MALE VOICE: What do you care?

FEMALE VOICE: What do I care? Oh, I don't know.

What's going on? Aren't you going to talk to me?

MALE VOICE: Huh?

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FEMALE VOICE: Aren't you going to talk to me?

MALE VOICE: Yes, I'm talking to you.

FEMALE VOICE: What's the matter?

MALE VOICE: Nothing.

FEMALE VOICE: Something is.

MALE VOICE: No.

FEMALE VOICE: Are you sleeping?

MALE VOICE: No.

FEMALE VOICE: What did you do?

MALE VOICE: Huh?

FEMALE VOICE: Did you take something?

MALE VOICE: No.

FEMALE VOICE: What the hell the matter with you?

MALE VOICE: Nothing.

Excerpts from Recorded Telephone Conversation

FEMALE VOICE: Something is. I thought I'd you know, call you up and tell you there was a guy that followed me home in a yellow and black car, do you know him?

MALE VOICE: In a yellow car?

FEMALE VOICE: Uh huh.

MALE VOICE: No.

FEMALE VOICE: Oh, what did you say?

MALE VOICE: Nothing.

(389)

FEMALE VOICE: Huh? What did you say?

MALE VOICE: Nothing.

FEMALE VOICE: What in the hell are you on?

MALE VOICE: Nothing.

FEMALE VOICE: You are too. You're lying to me.

MALE VOICE: No, I'm not.

FEMALE VOICE: Yes, you are. Are you laying there bleeding to death, huh? What did you do, slash your wrists?

MALE VOICE: No.

FEMALE VOICE: What?

MALE VOICE: No, I didn't, I didn't slash my wrists.

Hold on, got to get a light.

(Short pause).

FEMALE VOICE: Remember that night that you talked about why you killed Dan?

MALE VOICE: Yeah.

FEMALE VOICE: Mike, did you really kill him?

MALE VOICE: I don't think I did.

FEMALE VOICE: Then how come you told me (390) you did, huh?

MALE VOICE: Nancy, now listen to me for a minute.

FEMALE VOICE: Yes.

MALE VOICE: The way it happened — now listen to what I'm telling you. Whatever has sprung, sprang,

Excerpts from Recorded Telephone Conversation

sprung, whatever I'm telling you, what has sprung, sprang out of this, does it make a difference? Put it all together.

FEMALE VOICE: Did you do it really?

MALE VOICE: Does it make a difference to you?

FEMALE VOICE: Yes, it does, huh?

MALE VOICE: You want that answer, don't you?

FEMALE VOICE: Yes, I'm scared, I want the answer.

MALE VOICE: What are you scared of?

FEMALE VOICE: Because — I don't know. I'm just scared. That guy followed me home tonight and I just got scared and I want to know did you —

MALE VOICE: It was you who made that phone call wasn't it?

FEMALE VOICE: Yes, yes, I made the call to the police because some guy followed me home, yes. (391) Don't you know who he was, just a yellow and black car, I don't know him.

MALE VOICE: Yellow and black? Don't get upset, Honey.

FEMALE VOICE: All right, Mike. Did you — did you kill Danny?

MALE VOICE: Don't get upset, don't worry about anything.

FEMALE VOICE: I'm scared.

MALE VOICE: Why?

FEMALE VOICE: They're going to find out?

MALE VOICE: No, they're not.

FEMALE VOICE: How?

MALE VOICE: Now listen to me, Nance.

FEMALE VOICE: Where's that gun then, that was underneath the stereo that night?

MALE VOICE: Don't worry about that.

FEMALE VOICE: I want to know, Mike.

MALE VOICE: It's gone.

Excerpts from Recorded Telephone Conversation

FEMALE VOICE: What did you do with it?

MALE VOICE: It's gone.

FEMALE VOICE: Does Pat know what you did with the gun?

MALE VOICE: Yes, he does, it's gone.

FEMALE VOICE: Listen, I'm scared.

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MALE VOICE: Nancy, Honey —

FEMALE VOICE: What?

MALE VOICE: Now, listen to me. There's nothing to be afraid of.

FEMALE VOICE: Did you kill Dan, can you tell me that? Ever since you told me that night, I don't know whether to believe you or not. Did you? Now, it does make a difference to me.

MALE VOICE: Do you want me to tell you?

FEMALE VOICE: Yes, I want you to tell me.

MALE VOICE: Yes, I did. Do you want a reason?

FEMALE VOICE: Yes.

MALE VOICE: Okay. I'll tell you the reason. I will not — and I'll love to the day I die. I will not — I will not have anybody threatening to kill you or Tammy.

FEMALE VOICE: But he didn't threaten to kill me or Tammy. He has never threatened to kill me or Tammy.

MALE VOICE: What did you tell me when your mother-in-law called?

FEMALE VOICE: That I was upset, she was upset.

MALE VOICE: I got different versions. I (393) got different versions from people that were sitting with him in a bar.

FEMALE VOICE: What bar?

MALE VOICE: Does it make a difference?

FEMALE VOICE: Yes, might as well tell it like it is.

Excerpts from Recorded Telephone Conversation

MALE VOICE: Okay. Let's see — I'll tell it like it is. He was in All Sports Tavern and he was spreading words around all over hell. He was going to wipe you out baby.

FEMALE VOICE: Well, I could have committed him before you killed him, you know. What did you do, follow him or what?

MALE VOICE: No, I didn't. Remember me telling you I was going to go out and try to salvage your mind in so many words, you know, try to find out where the hell he was and so on and so forth.

FEMALE VOICE: No.

MALE VOICE: I remember it — got to find an ashtray.

I'm back. Anyway, I'll tell you something, honey, right now, flat out, no ifs ands or buts about it. You have absolutely nothing to do with what happened, absolutely nothing, you understand me?

FEMALE VOICE: Yes, I understand that, (394) because I know I didn't.

MALE VOICE: And I think I know where to put you. Now, listen, I'll tell you —

FEMALE VOICE: The cops —

MALE VOICE: I'll tell you what I've been doing, now listen to me for a minute.

FEMALE VOICE: Okay.

MALE VOICE: Please? Okay.

FEMALE VOICE: Yes.

MALE VOICE: You know, between Friday and today I have taken a half of a bottle of them goddammed things because I don't even know where the hell I am or why.

FEMALE VOICE: What did you take?

MALE VOICE: Huh?

FEMALE VOICE: What did you take?

MALE VOICE: Never mind what I took, never mind.

Excerpts from Recorded Telephone Conversation

FEMALE VOICE: Can you just tell me how you found Dan?

MALE VOICE: What do you mean, how I found him?

FEMALE VOICE: To kill him.

MALE VOICE: Nancy, when I took off that day, I told you I was going looking, didn't I? I know I (395) told you that, dear. Now, listen to me for a minute will you please?

FEMALE VOICE: Yes.

MALE VOICE: I told you already there isn't nothing, no way, one way or the other to connect you with this. Do you believe me, sweetheart?

FEMALE VOICE: Yes.

MALE VOICE: Do you?

FEMALE VOICE: Yes.

MALE VOICE: I hope you do. I really, really hope you do. Because there's nothing going wrong. I mean if something does go bananas or some bullshit, don't worry about it because dig it, there's only one person.

FEMALE VOICE: What about the cops?

MALE VOICE: Only one person.

FEMALE VOICE: What person?

MALE VOICE: Me, and the only way anybody is going to get anything, and I'll tell you this for a fact because I know, — because a friend of mine is a detective at the Buena Burrupp so on and so forth. The Buena Vista detectives are — whatever the hell they are, right.

FEMALE VOICE: Right.

MALE VOICE: They are going to close it because they ain't got nothing. They haven't got (396) the time to waste on it.

Hang on a minute, got to find some cigarettes.

(Short pause).

FEMALE VOICE: The Buena Vista police —

Excerpts from Recorded Telephone Conversation

MALE VOICE: Don't worry about them, they're punks.

FEMALE VOICE: When you were questioned —

MALE VOICE: Yes?

FEMALE VOICE: — what impression did they give you?

MALE VOICE: What?

FEMALE VOICE: What impression did they give you?

MALE VOICE: I told you exactly what impression I got. Do you believe me or don't you?

FEMALE VOICE: I don't know.

MALE VOICE: No.

FEMALE VOICE: They're not stupid, you know that.

MALE VOICE: They're twice as dumb as a dime.

FEMALE VOICE: Well, what if something goes wrong and they found — find out, what about —

MALE VOICE: What could go wrong? I'll tell (397) you right now —

FEMALE VOICE: I'm scared.

MALE VOICE: Now, you listen to me for a minute.

FEMALE VOICE: Okay.

MALE VOICE: I'll tell you right now —

FEMALE VOICE: I'm scared, yes.

MALE VOICE: Now you shut up and listen to me for a minute.

FEMALE VOICE: Okay.

MALE VOICE: Before I went up to the car — before I — okay. I'm going to talk to you straight. Before I went up to the car I had a rag in my hand. I wiped it — the handle off. I had the gun down in my hand, I opened the door. That fucking thing was sitting there so I pulled the gun next to his head and I pulled the trigger. That's not really how it happened but the thing went off. Anyway, it's too late to do anything about it.

FEMALE VOICE: Yes, I know it.

Excerpts from Recorded Telephone Conversation

Well, listen, I'm going to go, okay, and you get some sleep and I'm going to get some too, okay?

MALE VOICE: Nance?

FEMALE VOICE: Yes?

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MALE VOICE: Will you talk to me for a little bit, please, because I'm — goddammit, you know what I was going to do tonight.

FEMALE VOICE: What?

MALE VOICE: Now, I wanted to talk to you, honey. I really did, because if I wouldn't have talked to you you would have never seen me again because there wouldn't have been nothing left. That's a fact, because I got the bottles sitting right here and that's what I was going to do when I come home.

FEMALE VOICE: Think it will solve anything?

MALE VOICE: What?

FEMALE VOICE: Think it will solve anything?

MALE VOICE: It will probably help you out quite a bit, plus there's a letter.

FEMALE VOICE: Okay.

MALE VOICE: Going to burn it now.

FEMALE VOICE: Well, okay. Well, listen I'm so tired and I don't feel good today so I'm going to hang up and I'll talk to you later, okay? I'm going to get some sleep and I want you to get some sleep now too. I want you to lay down and go to sleep, sleep it off. You'll feel better tomorrow, okay?

MALE VOICE: All right, do you love me? No?

FEMALE VOICE: Yes.

. . .